TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 258.

MASON P. GRAY, PLAINTIFF IN ERROR,

vs.

THE STATE OF CONNECTICUT.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

FILED AUGUST 3, 1891.

(14,788.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 8, 1894.

1 Supreme Court of Errors, Second Judicial District, May Session, A. D. 1891.

STATE OF CONNECTICUT } Criminal Court of Common Pleas, New
vs. } London County, October Session, A. D.
MASON P. GRAY } 1890.

To Nathan S. Fish, Esq., a justice of the peace for the county of New London, residing in the town of Groton, now in the town of Groton comes Clayton B. Smith, prosecuting agent within and for the county of New London, duly appointed and sworn, and on his oath of office complaint and information makes that Mason P. Gray, of the town of Groton, on the 1st day of January, A. D. 1890, and on divers days and times between that day and the date of this complaint, with force and arms, at said town, did, without having a license therefor, keep a certain place in said town, in which said place it was then and there reputed that spirituous and intoxicating liquors were kept for sale, against the peace, of evil example, and contrary to the statute in such case made and provided.

And said prosecuting agent further complaint and information makes that on or about the first day of January, 1890, at said town of Groton, said Mason P. Gray, of said town, with force and arms, did, without having a license therefor, sell to a person, to this prosecuting agent unknown, of said town, certain spirituous and intoxicating liquors, to wit, rum, gin, whiskey, brandy, ale, wine, porter, lager beer, mixed liquors, mixed liquors of which a part is
2 spirituous and intoxicating, fermented cider to be drunk on the premises and sold in quantities less than one gallon, to be delivered at one time, other distilled spirits, beer manufactured from hops and malt and beer manufactured from hops and barley, beer on the receptacle containing which the laws of the U. S. require a revenue stamp to be affixed, against the peace, of evil example, and contrary to the statute in such case made and provided.

And said prosecuting agent further complaint and information makes that on the 1st day of January, 1890, and at varies times between then and the date of this complaint, at said town of Groton, said Mason P. Gray, of said town, with force and arms, did, without having a license therefor, keep certain spirituous and *and* intoxicating liquors, with intent to sell the same, against the peace, of evil example, and contrary to the statute in such case made and provided.

Whereupon your complainant prays due process in the premises.

Dated at Groton, the 23rd day of August, 1890.

CLAYTON B. SMITH,
Prosecuting Agent.

To the sheriff of the county of New London, his deputy, or either, constable of the town of Groton, in said county, Greeting:

By authority of the State of Connecticut you are hereby commanded to arrest the body of Mason P. Gray, named in the foregoing complaint, and him fort-with have before Nathan S. Fish, Esq.,

of Groton, a justice of the peace for said county, at his office in said town, to answer to the foregoing complaint and be thereupon dealt with as the law directs.

Hereof fail not, but of this warrant service and return make according to law.

Dated at Groton, the 23rd day of August, 1890.

NATHAN S. FISH,
Justice of the Peace.

To —— ——:

By authority of the State of Connecticut you are hereby commanded fort-with to appear before Nathan S. Fish, Esq., a justice of the peace for the county of New London, at his office in said Groton, to testify to what you know in a certain prosecution pending before said court against Mason P. Gray.

Fail not to appear as above-commanded under penalty of the law.

To any proper officer or indifferent person to serve and return.

Dated at Groton, the 23rd day of August, 1890.

NATHAN S. FISH,
Justice of the Peace.

STATE OF CONNECTICUT, } ss:
County of New London, }

GROTON, *August* 25, 1890.

Then and there, by virtue of the within and foregoing complaint and warrant, I arrested the body of the within-named Mason P. Gray, read this complaint and warrant in his presence and hearing, acquainted him with the substance of this process, and have him herein and before Nathan S. Fish, Esq., a justice of the peace for said county, to answer to the within complaint and be thereon dealt with as the law directs, and I duly served the above subpœna upon the witnesses therein named by reading the same in the presence and hearing of each of them.

Attest: JOHN N. CARROLL,
Deputy Sheriff.

Fees.

Travel to arrest	$	80
Arrest		50
Travel to court with prisoner	1	25
Attendance at court with prisoner		50
	$3	05

STATE }
vs.
MASON P. GRAY. }

Complaint for reputation, keeping for sale and sale of spirituous and intoxicating liquors.

Plea, not guilty; demurrer overruled; found guilty; ordered to pay a fine of $80 and costs, taxed at $18.90, and stand committed until judgment be complied with; from which judgment the said

Mason P. Gray moved an appeal to the next session of the criminal court of common pleas in and for said New London county, to be held on the 2nd Tuesday of September, 1890; which said motion was allowed; whereupon the said Mason P. Gray, as principal, and Joseph A. Allen, as surety, are jointly and severally recognized to the State of Connecticut in the sum of $200.00, conditioned that the said Mason P. Gray shall appear before the next session of the criminal court of common pleas in and for New London county, to be held on the second Tuesday of September, 1890, at Norwich, then and there to answer to said complaint and abide the order and judgment of said court thereon.

NATHAN S. FISH,
Justice of the Peace.

Attest:

Costs.

5	$1 00
Warrant	25
Subpœna	10 00
Prosecuting agent	1 50
Court fee (1st day)	10
Bond	3 05
Officer's fees	
	$15 90
	2 00
Copies	
	$18 90

Taxed by Nathan S. Fish, judge.

At a session of the criminal court of common pleas of the State of Connecticut held at New London, within and for the county of New London, on the second Tuesday of October, A. D. 1890.

Present: Hon. John G. Crump, judge.

Upon the complaint of Clayton B. Smith, Esq., a prosecuting agent within and for the county of New London, charging Mason P. Gray of Groton, in said county, now in custody of the sheriff of said county, with the crime of a violation of the liquor law, as per copy on file, in three counts, said cause came to this court by an appeal from the decision of a justice of the peace in and for said county, and by legal continuances came to the present session, when the attorney for the State entered a "*nolle prosequi*" upon the first count by consent of the court.

And now, at this time, the prisoner appeared and for plea said, "not guilty." And after a full hearing said cause was committed to the jury, who returned a verdict of "guilty." It is therefore considered by the court that the prisoner is guilty in manner and form as charged in said 2nd and 3rd counts of said complaint.

The court thereupon sentenced the said prisoner to pay a fine of fifty dollars, and to pay the costs of this prosecution,
6 taxed at — dollars and — cents, and stand committed until judgment is complied with.

Criminal Court of Common Pleas, October Session, 1890.

STATE }
vs.
MASON P. GRAY. }

Defendant's Notice of Appeal.

The defendant in the above-entitled cause appeals from the judgment of said court to the supreme court of errors next to be holden in and for the second judicial district on the last Tuesday of May, 1891.

MASON P. GRAY, *Defendant*,
By his attorney, S. H. THRESHER.

Criminal Court of Common Pleas, New London Co., October Session, 1890.

STATE }
vs.
MASON P. GRAY. }

Finding of Facts.

Upon the trial of the above-entitled cause to a jury upon the plea of not guilty the accused offered evidence to prove and claimed that he had proved that he was a pharmacist, duly licensed by the State board of pharmacy, doing business in the village of Mystic River, in the town of Groton, where he had been engaged in the same occupation for thirteen years past. That he was so licensed was admitted by the State. The State offered evidence to prove and claimed to have proved that the accused had paid the United States revenue tax for a license to sell spirituous and intoxicating liquors for one year, commencing May 1, 1890. This the accused did not deny. It was admitted that the accused did not have a druggist's license from the county commissioners at the time
7 the alleged offense was committed. He had applied for one, but the said commissioners had refused it. The State offered evidence to prove and claimed that it had proved that the accused kept spirituous and intoxicating liquors to use in compounding medecines, and that he sold the same on physicians' prescriptions. The accused admitted that he kept such liquors and used them in compounding medecines, but denied that he sold any uncompounded on physicians' prescriptions. The accused offered the evidence of two licensed pharmacists, which was not denied by the State, that the business of a pharmacist could not be conducted without the use of spirituous and intoxicating liquors in compounding medecines.

The accused asked the court to charge the jury as follows:

1. "If the jury shall find that the defendant did not sell nor keep with intent to sell spirituous and intoxicating liquors as such, but kept such liquors to be used in compounding medecines and in dispensing the prescriptions of physicians, it is their duty to acquit the accused."

2. "That the legislature did not intend to apply the provisions of section 3087 of the Revised Statutes of this State to a licensed pharmacist."

3. "That the defendant in the pursuit of his occupation as a licensed pharmacist had the right to use in the compounding of his medecines and tinctures all ingredients necessary to their proper preparation, whether such ingredients or any of them were spirituous or intoxicating or otherwise, and that the defendant had the right to use spirituous or intoxicating liquors in the compounding of the prescriptions of physicians."

8 4. "That the State having licensed the accused to pursue his business and occupation as a pharmacist, the board of commissioners for New London county could not by any action of theirs deprive him of the right to pursue his said business in all its branches."

5. "That sections 3087 and 3067 of the Revised Statutes are contrary to the provisions of the constitution of this State, in that and because they deprive the defendant of his property in another manner than by due course of law."

6. "That said sections above referred to and each of them are contrary to the provisions of the fourteenth amendment of the Constitution of the United States, because they abridge his privileges and immunities as a citizen of the United States and deprive him of his property without due course of law."

The court did not so charge, but charged as follows:

"GENTLEMEN OF THE JURY: The question in this case, gentlemen, is a very simple one. It is admitted that the prisoner at the bar is a licensed pharmacist in the town of Groton, at what was formerly Mystic River, now Mystic. It is admitted that he has no license from the county commissioners to keep or use for the purpose of sale or exchange spirituous or intoxicating liquors. It is further admitted that he has kept and used certain intoxicating liquors and sold them for the purpose of compounding prescriptions. These are the facts as admitted or not denied in this case. He claims, however, that he has never sold any liquors, never sold or used any for any other purpose than in compounding prescrip-

9 tions; that this he is entitled to do by reason of a license he holds from the State board of pharmacy, and witnesses have been introduced here who have testified that it is necessary to the conduct of the business of pharmacy that liquors should be used in compounding prescriptions. Now, gentlemen of the jury, in 1881 the legislature of the State, in the exercise of its undisputed police authority to restrain and restrict a dangerous traffic, that of pharmacy—the compounding and selling drugs at retail—passed a statute which, among other things, made it necessary for anybody thereafter practising that business in this State to obtain from a board, a competent board, a license to pursue that business, so that it was made then a prerequisite to the drug business in this State that anybody practising it should obtain a license from the State board of pharmacy and comply with the regulations which it and

the law established. The legislature said at that time that no other person in the State should have a right to practise that—it is not a natural right in persons—and said statute required that nobody should thereafter practise pharmacy at all unless he complied with these regulations. In 1883 the legislature, in the exercise of the same police authority and to restrain and confine a dangerous traffic, to wit, that in spirituous and intoxicating liquors, which exercise our courts have always considered constitutional, passed a law that any pharmacist who wished to use liquors in compounding prescriptions must obtain a license therefor from the county commissioners. Now the question before you is not whether the county commissioners or the State board of pharmacy has rightfully used the authority
10 reposed in it. We have nothing to do with that in this tribunal.

The only question for you to determine is whether the prisoner at the bar has complied with the regulations of the law; whether he has in conducting his business used liquors in compounding prescriptions without having a license therefor from the board of pharmacy and county commissioners. The State further raises the question that upon a former trial the defendant admitted that he sold liquors upon prescription. He denies this on the stand in this case, and it is for you to determine as to where the truth lies. It is further stated and admitted that he had a license from the United States Government for the selling or keeping of intoxicating liquors of a certain character, and our law makes that *prima facie* evidence that if he had no State license to keep those liquors that it was for an unlawful purpose of sale, as charged here. He may, however, rebut that *prima facie* evidence by showing that he has not sold liquors, and his own evidence is that he has not, except by compounding them with prescriptions, and that he may do this under the law. So, gentlemen, the issue is very simple, and you have only to determine the fact whether or not he has violated the law in using liquors in his business in compounding and selling prescriptions without having a license therefor from the county commissioners. That is the principal and substantial issue in the case, and upon your oath, according to the law and the evidence submitted to you, you will decide this case.

As to the constitutionality of the law, it seems to me, gentlemen, there is very little question about that. The State has the
11 undisputed right, and our courts have sustained it repeatedly in the exercise of police authority to restrain any dangerous business. It has restrained people in the business of selling drugs; it has restrained them in the sale of intoxicating liquors. In this case these two things come together. If it is necessary, as witnesses have testified, that a man should use liquor in compounding medicines in this State and cannot practice the business of druggist without it, then the law makes it a prerequisite to obtain not only a license from the board of pharmacy, but also from the county commissioners. It is admitted here that no such license from the county commissioners exists, and, further, that the prisoner at the bar used liquor in the compounding of medicines without such license.

CRUMP, *Judge.*"

Criminal Court of Common Pleas, New London County, October Session, 1890.

STATE
vs.
MASON P. GRAY.

Defendant's Appeal.

In the above-entitled cause the defendant appeals from the judgment of said court to the supreme court of errors, to be held at Norwich, in and for the second judicial district, on the last Tuesday of May, A. D. 1891, for the revision of the errors which he claims to have occurred in the trial thereof, and for reasons of said appeal he assigns the following, to wit:

1. The court erred in not charging the jury as requested by the defendant.

2. The court erred in charging the jury: "The only question for you to determine is whether the prisoner at the bar
12 has complied with the regulations of the law, whether he has in conducting his business used liquors in compounding prescriptions without having a license therefor from the board of pharmacy and the county commissioners."

3. The court erred in charging the jury: "So, gentlemen, the issue is very simple, and you have only to determine the fact whether or not he has violated the law in using liquors in his business in compounding and selling prescriptions without having a license therefor from the county commissioners. This is the principal and substantial issue in the case."

4. The court erred in charging the jury: "If it is necessary, as witnesses have testified, that a man should use liquor in compounding medecines in this State and cannot practice the business of druggist without it, then the law makes it a prerequisite to obtain not only a license from the board of pharmacy, but also from the county commissioners."

5. The court erred in not charging the jury that the legislature did not intend to apply the provisions of section 3087 of the General Statutes to a licensed pharmacist.

6. The court erred in not charging the jury that sections 3087 and 3067 were contrary to the provisions of the constitution of this State.

7. The court erred in not charging the jury that said sections were contrary to the provisions of the fourteenth amendment of the Constitution of the United States, because they abridge the privileges and immunities of the defendant as a citizen of the United
13 States and deprive him of his property without due process of law.

Dated at New London, this 10th day of March, A. D. 1891.

MASON P. GRAY,
By S. H. THRESHER,
His Attorney.

I certify that the foregoing appeal was filed on the 10th day of March, 1891, and Joseph A. Allen, of Groton, is recognised in the sum of $100.00, conditioned that said Mason P. Gray shall prosecute said appeal to effect and pay all costs therein if he shall fail so to do, and said appeal is hereby allowed.

JOHN C. AVERILL, *Clerk.*

Attest:

Supreme Court of Errors, Second Judicial District, May Term, A. D. 1891.

STATE OF CONNECTICUT }
vs.
MASON P. GRAY. }

Motion to Rectify Appeal.

In the above-entitled cause the defendant moves that the appeal be rectified by striking out from the finding of facts, in paragraph six thereof, the concluding words of said paragraph, viz., "in compounding medecines."

Defendant, MASON P. GRAY,
By S. H. THRESHER,
His Attorney.

Motion allowed. Finding amended as stated in the foregoing motion.

CHARLES B. ANDREWS, *C. J.*

14 STATE OF CONNECTICUT:

Supreme Court of Errors, Second Judicial District, May Term, A. D. 1891, to wit, May 26th, A. D. 1891.

And now, the foregoing record in the within-entitled cause having been transmitted to this court at the above-named term thereof for the correction of the errors therein assigned, and the parties having been fully heard before this court, upon the 26th day of May, A. D. 1891, this court finds that there is no error apparent upon the record.

Judgment dated June 19th, A. D. 1891.

Reasons by Fenn, J.

By the court:

JOHN C. AVERILL, *Clerk.*

STATE OF CONNECTICUT, } *ss.*
County of New London, }

Office of the clerk of the supreme court of errors, second judicial district.

NORWICH, *July 22nd*, A. D. 1891.

I, John C. Averill, clerk of said court for said district, keeper of the seal, files, and records thereof, do hereby certify that the within and foregoing is a correct copy of record of said court.

In testimony whereof I hereunto set my hand and the
[SEAL.] seal of said court, at Norwich aforesaid, this 22nd day of July, A. D. 1891.

JOHN C. AVERILL, *Clerk.*

15 UNITED STATES OF AMERICA, *ss:*

Seal of Circuit Court, Connecticut.

The President of the United States of America to the honorable the judges of the supreme court of errors of the State of Connecticut, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of errors of the State of Connecticut, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between The State of Connecticut and Mason P. Gray, of the town of Groton and county of New London, in said State, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validty of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or

16 of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Mason P. Gray, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the thirtieth day of July next, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 30th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

EDWIN E. MARVIN,
Clerk of the Circuit Court of the United States for the District of Connecticut.

Allowed by—
CHARLES B. ANDREWS,
Chief Justice of the Supreme Court of Errors of Connecticut.

17 The United States of America to the State of Connecticut, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, on the 30th day of July, A. D. 1891, pursuant to a writ of error filed in the office of the clerk of the supreme court of errors of the State of Connecticut, in the second judicial district, wherein Mason P. Gray is plaintiff in error and The State of Connecticut is defendant in error, to show cause, if any there be, why the judgment and decree rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done in that behalf.

Witness the Honorable Charles B. Andrews, chief justice of the supreme court of errors of the State of Connecticut, this 30th day of June, A. D. 1891.

CHARLES B. ANDREWS,
Chief Justice of the Supreme Court of Errors of Connecticut.

UNITED STATES OF AMERICA, } ss:
State of Connecticut, Norwich, }

Due and legal service of the above citation is hereby acknowledged this 30th day of June, A. D. 1891.

STATE OF CONNECTICUT,
By SOLOMON LUCAS,
State's Attorney for New London County.

18 STATE OF CONNECTICUT, } ss:
Hartford County, }

HARTFORD, *June 30th*, 1891.

Then and there I left with and in the hands of Morgan G. Bulkeley, governor of the State of Connecticut, a true and attested copy of the within citation.

Attest:

R. B. HETHERTON,
Deputy Sheriff.

STATE OF CONNECTICUT, } ss:
Hartford County, }

HARTFORD, *June 30th*, 1891.

On this 30th day of June, 1891, before the subscriber, a clerk of the superior court of said Hartford county, personally appeared the above-named R. B. Hetherton, whom I hereby certify to be a deputy sheriff of said county, and signed and swore to the truth of the above return before me.

[Seal Superior Court, Hartford County, Ct.]

FRANCIS CHAMBERS,
Clerk of Superior Court for Hartford County, Conn.

19 Supreme Court of the United States.

STATE OF CONNECTICUT,
vs.
MASON P. GRAY.

Know all men by these presents that we, Mason P. Gray, of the town of Groton, in the county of New London and State of Connecticut, and John Gray and Emma Gray, of said Groton, are held and firmly bound unto The State of Connecticut in the sum of five hundred dollars, to be paid to the said State of Connecticut; to which payment, well and truly to be paid, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Signed with our hands and sealed with our seals this 30th day of June, A. D. 1891.

Whereas the above-named Mason P. Gray hath prosecuted a writ of error to the supreme court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of errors of the State of Connecticut:

Now, therefore, the condition of this obligation is such that if the above-named Mason P. Gray shall prosecute his said writ of error to effect and answer all fines, penalties, and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

MASON P. GRAY. [SEAL.]
JNO. GRAY. [SEAL.]
EMMA GRAY. [SEAL.]

UNITED STATES OF AMERICA, } *ss:*
State of Connecticut, }

GROTON, *June 30th*, 1891.

Personally appeared Mason P. Gray, John Gray, and Emma
20 Gray, signers and sealers of the foregoing instrument, and acknowledged the same to be their free act and deed before me, and the said John Gray and the said Emma Gray justified under oath before me in more than twice the amount of the within bond.

S. H. THRESHER,
Notary Public. [SEAL.]

Approved by—
CHARLES B. ANDREWS,
Chief Justice of the Supreme Court of Errors of Connecticut.

A correct copy of the original bond on file in this office.
Attest: JOHN C. AVERILL, *Clerk.*

21 Supreme Court of the United States.

MASON P. GRAY, Plaintiff in Error,
vs.
THE STATE OF CONNECTICUT, Defendant in Error.

In the above-entitled cause the plaintiff, for an assignment of errors, refers to those errors claimed in his "reasons of appeal" before the supreme court of errors of Connecticut and apparent upon the record in this court.

The plaintiff prays this honorable court that the judgment of the said supreme court of errors may be reversed and set aside.

Dated at Norwich, Connecticut, this 30th day of June, A. D. 1891.

MASON P. GRAY,
Plaintiff in Error,
By his attorney, S. H. THRESHER.

Endorsed on cover: Case No. 14,788. Connecticut supreme court of errors. No. 258. Mason P. Gray, plaintiff in error, *vs.* The State of Connecticut. Filed August 3, 1891.

Office Supreme Court, U. S.
FILED.
APR 5 1895
JAMES H. McKENNEY,
CLERK.

No. 258. October Term, 1894.

In the

Supreme Court of the United States.

MASON P. GRAY,
Plaintiff in Error,

vs.

STATE OF CONNECTICUT,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

S. H. THRESHER,
Counsel.

BULLETIN PRINT, NORWICH, CONN.

IN THE SUPREME COURT OF THE UNITED STATES.

MASON P. GRAY,
Plaintiff in Error,
vs.
STATE OF CONNECTICUT,
Defendant in Error.

October Term,
1894.
No. 258.

BRIEF OF PLAINTIFF IN ERROR.

ASSIGNMENT OF ERRORS.

1. The Court below erred in not reversing the verdict and judgment in the Court of Common Pleas.

2. The Court erred in not holding that Sections 3067 and 3087 were unconstitutional by reason of their abridging the privileges and immunities of the plaintiff in error as a citizen of the United States' and depriving him of his property without due process of law.

3. The Court erred in not holding that the State having licensed the plaintiff in error to pursue the business of pharmacy, it was beyond its power, through the Board of County Commissioners, to deprive him arbitrarily of his right to pursue that business.

STATEMENT OF CASE.

The plaintiff in error, a citizen of Connecticut and a citizen of the United States, a pharmacist duly licensed by the State of Connecticut, to pursue the business of pharmacy, doing business in the town of Groton, a "no license" town, in said State, was, on the 25th day of August, 1890, brought before Nathan S. Fish, charged with selling liquors without a license. The charge being based upon section 3087 of the revised statutes of the State of Connecticut, which reads as follows: "Any person who, without a license therefor, shall, by sample, by soliciting or procuring orders, or otherwise, sell or exchange, or shall offer or expose for sale or exchange, any spirituous and intoxicating liquors, and any person licensed to sell or exchange ale, lager beer, cider and Rhine wine only, who shall in the place where he is so licensed to sell ale, lager beer, cider and Rhine wine only, keep, sell, exchange or give away any other spirituous and intoxicating liquors, shall be fined for the first offense not more than fifty dollars; for the second offense he shall be fined fifty dollars and be imprisoned for thirty days; and for the third and every subsequent offense he shall be fined one hundred dollars, and imprisoned for sixty days."

His case came by appeal to the Court of Common Pleas in New London County, in said State, and was there tried to a jury and the defendant found guilty upon the general verdict. By appeal the case came to the Supreme Court of Errors of said State, and thence by writ of error to this Court. The sale of spirituous and intoxicating liquors by druggists is regulated by the General Statutes of Connecti-

cut, sections 3064 and 3067, which read respectively as follows: "Any druggist, regularly licensed by the Commissioners of Pharmacy, may be licensed to use spirituous and intoxicating liquors for compounding prescriptions, and to sell spirituous and intoxicating liquors upon the prescription of any practising physician, upon the payment of a fee of twelve dollars; but druggists doing business in towns containing less than five thousand inhabitants shall only be required to pay ten dollars for such license; and any druggist regularly licensed by the Commissioners of Pharmacy, as aforesaid may, upon the payment of fifty dollars, be licensed to sell spirituous and intoxicating liquors in quantities not exceeding one gallon, and other than distilled liquors in quantities not exceeding five gallons; but no license so issued to any such druggist shall authorize the sale or delivery of any spirituous and intoxicating liquors to be drunk upon the premises or be sold otherwise than above specified. Whenever any town shall have voted against the granting of licenses for the sale of spirituous and intoxicating liquors, any druggist regularly licensed by the Commissioners of Pharmacy and doing business under such license in such town may, upon exhibiting such license and upon payment of twelve dollars to the County Commissioners of the county in which such town is situated, be entitled to receive from said County Commissioners a license to sell and deliver spirituous and intoxicating liquors upon the prescription of a practising physician, and to use the same in compounding medicine; but no druggist so licensed shall sell or deliver such liquor to be drunk on the premises."

SECTION 3067. "No license shall be granted to any druggist unless application for the same, signed by the applicant and stating the town and the particular building, naming street and number, if such there be, where the business is to be carried on, has been lodged with the County Commissioners at least two weeks prior thereto, and the granting of any such license shall be discretionary with

the County Commissioners. All statutes allowing persons to file objections to the granting of any license for the sale of spirituous and intoxicating liquors, providing for hearing upon the same and authorizing County Commissioners to revoke licenses for such sale, shall apply to all licenses to druggists applied for or granted under the provisions of this chapter."

BRIEF OF THE ARGUMENT.

The record discloses that the plaintiff in error was at the time of his arrest a pharmacist, that he had been engaged in the business of pharmacy for thirteen years and that he was duly licensed under the provisions of the "Pharmacy Law" of Connecticut, contained in the General Statutes, Title XV., p. 681, Section 3121, enacted in 1881-2, which provides as follows:—

"No person shall conduct or keep a shop, store or place of any kind for retailing drugs, medicines, or such chemicals as are used in compounding medicines, or compound or dispense prescriptions of a physician, or vend medicines or poisons, unless he shall have been licensed therefor as hereinafter provided." * * * *

It will be seen that the applicant for a license must submit to a personal examination by the Commissioners of Pharmacy, and that the license shall specify the name of the person licensed, the date when granted, the place where the business shall be conducted, and is required to be conspicuously exhibited in his place of business, and, upon application for its renewal, the applicant is required to establish his right thereto by evidence satisfactory to the Commissioners of Pharmacy. A fee is required to be

paid by the person licensed, and penalties are prescribed for any violation of the law. The Commissioners are also empowered and required to examine into all cases of alleged fraud, abuse, and incompetence, and to cause the prosecution of persons not complying with the provisions of the law.

Gen. Statutes Conn., p. 681, Secs. 3121, 3122, 3123, 3124, 3125, 3126.

Is it to be contended that a citizen found by the State pursuing this business, *i. e.*, pharmacy, before the so-called "Pharmacy Law" was enacted in Connecticut, and who has complied with all the provisions and requirements of that law, is, because of the arbitrary action of the County Commissioners in refusing to grant him a druggist's license for the sale of intoxicating liquors, without the assignment of any reason for such deprivation, and merely because of their arbitrary will or caprice, to be deprived of his right to conduct a business lawful in itself of a beneficent nature and which it is conceded (and the fact is apparent upon the record), cannot be conducted without the use of spirituous and intoxicating liquors in the compounding of medicines and the compounding and dispensing of physicians' prescriptions?

This construction would, as was said in the Court below, result in reducing a license granted by the State to the appellant to pursue a lawful occupation, that of pharmacist, to a mere naked permission to apply to the County Commissioners for leave to conduct his business, and leave the matter to their absolute, arbitrary, and unregulated will, with no right of appeal from their decision.

We submit that no authorities can be adduced tending to show that liquids, spirituous or intoxicating in their

nature, when compounded with drugs or chemicals, for use as medicine, or in commerce, or the arts, still preserve their identity *as spirituous or intoxicating liquors*. It is against the common reason of mankind.

If the States where absolute "Prohibition" has prevailed, an exception has been made, exempting from the operation of the law, liquors sold or used for sacramental, medicinal, mechanical and chemical purposes; and this exception is founded upon the highest reason: the spiritual, bodily and material welfare of the community.

Laws of Maine, Iowa, Kansas.
Wynehamer *vs.* People, 13 N. Y., 433.
Kansas Act of Feb. 19, 1881.
Mugler *vs.* Kansas, 123, U. S., p. 655.

As this prosecution was predicated upon the seizure of several vessels said to contain spirituous and intoxicating liquors in small quantities, found in the drug store of the plaintiff in error, there can be no question in regard to the taking of his property. Bearing in mind the definition of "due process of law," given by Mr. Justice Johnson of this Court, viz: * * * "After volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this, that they are intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." It would seem, that unless the statutes in question come within the police power of the State, and unless, in some unknown manner they perform their functions, *i. e.*, "the prevention of intemperance, pauperism and crime," they must be considered unconstitutional. The maxim, *sic utere tuo ut alienum non laedas*, is said to lie at the foundation of this (the police) power, but it is difficult to imagine its application to this case, if the appellant is to be deprived of his property and means of livelihood, because

of the arbitrary exercise of the "discretion" given to the County Commissioners by Section 3067 of the General Statutes.

Gen. Stat. Conn., Sec. 3067.

The language of Judge Sawyer, *in re* Christensen, reported in the American Law Register, March, 1891, is applicable to this case. "The fact that it permits arbitrary discriminations and abuses in its execution, depending upon no condition or qualification whatever, other than the unregulated arbitrary will of certain designated persons—in this case, the County Commissioners—is the touchstone by which its validity is to be tested, and in order to be constitutional and valid it should prescribe "some conditions, qualifications or disqualifications by which those who are to issue licenses (the County Commissioners) are to be guided in their action, other than their own unregulated arbitrary will."

In re Christensen, *supra*.
Crowley *vs*. Christensen 137, U. S. 86.

Absence of these conditions and qualifications in the act in question render it unconstitutional and void. It will readily be seen that the law, as it is at present, leaves within the power of three men in each county of the state the right by their mere caprice to close any pharmacy within their respective counties. It cannot be that a citizen takes this risk in entering upon the business of pharmacy? Still less can it be contended that a pharmacist conducting his business *previous* to the passage of the law regulating it and having other qualifications as evidenced by his license for the proper conduct of said business, can by any action of this Board of Commissioners be deprived of his property without the right of appeal to another and superior tribunal, and we believe that this doctrine has at last been recognized in this State for such appeal is by our very recent statutes now permitted.

Public Acts of Conn., 1892, Chapter CLXXV., p. 319.

It is not believed that any case of recognized authority has gone so far as to determine that tinctures and ointments containing alcohol are "mixed liquors," a part of of which is spirituous and intoxicating, (the plaintiff in error having been charged in the complaint with their sale) or that liquids spirituous and intoxicating in their nature when compounded with drugs or chemicals for use as medicine, or in commerce, or the arts, still preserve their identity *as spirituous and intoxicating liquors;* and if a physician, in good faith, prescribes intoxicants it is the *duty* of the pharmacist to dispense them.

The State Courts have upheld the statutes in restriction of the sale of liquors to the last degree, and rightfully, but when their construction of a statute effects a confiscation of the property of the citizen, it is time that the Federal Court should intervene.

It is a cardinal principle that a licensee has a right to do everything that is proper and necessary for the enjoyment of his license, but he cannot vary or extend its terms. Here is a license to pursue the business of pharmacy. It is admitted that this business cannot be conducted without the use of spirituous and intoxicating liquors. Unless this provision of the statute as has been said, is a mere naked permission to apply to the Board of County Commissioners for a "druggist's license for the sale of liquors"—it is difficult to avoid the conclusion that the plaintiff in error has suffered the deprivation of his property without due process of law—property in a business which he possessed before the pharmacy law was enacted.

It cannot be claimed that this case comes under the weight of the uniform body of decisions in the State and Federal Courts upholding the right of the State to regulate and control the traffic in intoxicating liquor. The plaintiff in error has not sought to conduct a traffic in intoxicants, but has merely attempted to carry on the business for which he is licensed by the State, viz., Pharmacy ; and if this Court should decide that the dispensing of a

physician's prescription containing intoxicating liquor was not within his power, we believe that it will not hold that he is precluded from selling tincture of arnica, or medicines, or ointments, into the composition of which, alcohol enters.

We do not understand that the reversal of Crowley *vs.* Christensen involves a criticism of that portion of Judge Sawyer's opinion above quoted. The reasoning is so sound in its application to this case that its weight and authority can hardly be avoided. In this case the plaintiff in error, having previously been licensed, and arbitrarily deprived of his druggist's license by the County Commissioners' refusal to renew it, comes within the protection afforded by the doctrine laid down by Mr. Justice Field, in his opinion in Bartmeyer *vs.* Iowa, 85, U. S., p. 129, a case cited in the brief of the learned counsel for the State. He says: "I have no doubt of the power of the State to regulate the sale of intoxicating liquors, when such regulation does not amount to the destruction of the right of property in them. The right of property in an article involves the power to sell and dispose of such article, as well as to use and enjoy it. Any act which declares that the owner shall neither sell it nor dispose of it nor enjoy it, confiscates it, depriving him of his property without due process of law. Against such arbitrary legislation the Fourteenth Amendment affords protection."

Bartmeyer *vs.* Iowa, 85 U. S., p. 129.

In this case the party injured has no right of appeal—no Court passes upon the merits or demerits of his cause, his case is not even presented to or heard by this irresponsible board. He presents his application for a druggist's license, he tenders the license fee, and after due time, without the privilege of a hearing, finds his application has been refused.

It is a travesty upon justice. It places those who pursue an honorable and beneficent calling, one without which no civilized community can exist, at the mercy of the pique or caprice, or something worse, of an irresponsible body of men whose actions are of such a character that a strong sentiment in the State is even now working for the abolition of their office and the placing of the licensing power in the hands of the Courts. The plaintiff in error is willing to submit his case upon this single contention. That the Legislature of Connecticut could not under the police, or any other power, place in the hands of the Board of County Commissioners for New London County, the right to close the doors of this *licensed* pharmacist upon their mere whim or caprice, and without an appeal from their action being permitted.

The discretion of the County Commissioners to grant or refuse a liquor license cannot be controlled by mandamus in Connecticut, but the contrary doctrine was held by Chief Justice Park in relation to druggists in "no license" towns, having a license from the Commissioners of Pharmacy; and his decision led to the Legislature giving them, the County Commissioners, discretion in these cases.

It is well settled law, however, that this "discretion" is not an arbitrary one, *even when it is vested in a Court.*

Am. and Eng. Encyclopedia of Law, Vol. 11, pages 649, 651.

Louisville *vs.* Kean, 18, B. Mon. (Ky) 9.

On the contrary it is a *judicial* discretion and it was held in New York, that under the (then) Excise Law, the justices who are charged with the granting of licenses,

have a discretion, but that their duties are so plainly defined that in case they disregarded them they *are liable to indictment.*

People *vs.* Norton, 7 Barber, 447.
See *ex-parte* Levy 43, Ark. 42.

CONCLUSION.

The plaintiff in error was at the time of the bringing of this action in possession of a business which he had conducted successfully for thirteen years. The business was a lawful and an honorable calling. Suddenly, without fault on his part, he finds himself precluded from pursuing his calling because of the arbitrary action of this Board of County Commissioners. He has no right of appeal; his business is gone. He cannot sell, exchange or give away any of that portion of his stock in trade containing alcohol in any of its forms; the good will of the business is worthless. It is true that the state, through its Board of Pharmacy Commissioners has found that he is qualified and competent to carry on the business and has authorized him to do so by a license. It is equally true that the business cannot be conducted without the use of spirituous and intoxicating liquors in compounding medicines," (Record, p. 4) but, the State contends that the action of the County Commissioners is final and there is no redress. If this case as stated does not come within the principle laid down by Mr. Justice Field, in Bartmeyer *vs.* Iowa, it is difficult to discern how it can escape it.

"The right of property in an article involves the power to sell and dispose of such article as well as to use and enjoy it. Any act which declares that the owner shall neither sell it nor dispose of it nor enjoy it, confiscates it, depriving him of his property without due process of law."

Bartmeyer *vs.* Iowa, 88, U. S., 129.

S. H. THRESHER.

Office Supreme Court, U. S.
FILED.
MAR 4 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1894.

No. 258.

MASON P. GRAY,

Plaintiff in Error.

VS.

STATE OF CONNECTICUT.

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

BRIEF

FOR THE STATE OF CONNECTICUT, DEFENDANT IN ERROR.

SOLOMON LUCAS,
STATE'S ATTORNEY, } *of Counsel.*

NORWICH, CONN.:
NORWICH PRINTING AND BINDING CO.
1894.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1894.

No. 258.

Mason P. Gray, Plaintiff in Error,

vs.

The State of Connecticut.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

Brief of Counsel for the State of Connecticut.

STATEMENT.

The plaintiff in error was charged in a complaint consisting of three counts with having violated the law of the State of Connecticut. The first count having been disposed of by a *nolle prosequi*, he was tried on the other two counts on a plea of not guilty and a general verdict of guilty was rendered by the jury. The criminal charges against him in brief were—that he had kept for sale and had sold spirituous and intoxicating liquors without having a license therefor.

POINTS.

I.

The statute law of the State of Connecticut relative to the subject matter complained of is as follows, namely:

1. The term spirituous and intoxicating liquors includes all spirituous and intoxicating liquors and all mixed liquors of which a part is spirituous and intoxicating.

R. S. 1888, § 3048.

2. Any person who without having a license therefor shall sell or exchange or shall offer or expose for sale or exchange or shall own or keep with intent to sell or exchange, any spirituous and intoxicating liquors, shall be fined.

R. S. 1888, § 3087.

3. Any druggist regularly licensed by the commissioners of pharmacy may be licensed to use spirituous and intoxicating liquors for compounding prescriptions, and to sell spirituous and intoxicating liquors upon the prescription of any practicing physician. This is designated a druggist's license.

R. S. 1888, § 3064.

4. That such license to a druggist shall not be granted unless upon application made in the manner prescribed, and that the granting of such license shall be discretionary with the County Commissioners.

R. S. 1888, § 3067.

II.

1. A party appealing to the Supreme Court of Errors of the State of Connecticut must state the special errors complained of distinctly.

R. S. 1888, § 1133.

2. There must be a special assignment of errors in which the precise matter in error or defect in the proceedings in the Court below, relied upon as grounds of reversal, must be set forth, and no others will be heard or considered by the Court.

Practice Act and Gen. Rules, page 258, chapt. 14, § 1.

3. The only assignment of error that was properly brought before the Supreme Court of Errors of the State of Connecticut that this Court will consider, is the seventh,

found on page 7th of the record and is as follows: That the Court erred in not charging the jury that said sections (meaning sections 3087 and 3067) were contrary to the fourteenth amendment of the constitution of the United States because they abridge the privileges and immunities of the defendant (the plaintiff in error) as a citizen of the United States and deprive him of his property without due process of law.

4. If either of these sections is constitutional, this assignment of error would not avail the plaintiff in error, because the assignment of error is that the Court refused to charge that both sections were unconstitutional. If the plaintiff in error had desired to raise the question that one of the two was unconstitutional, if both were not, he should have requested the Court to charge as to each section and should have assigned as error that the Court refused to charge as requested.

III.

1. The record does not disclose that the plaintiff in error was or is a citizen of the United States, and therefore the single question presented for decision of this Court is whether he has been deprived of his property without due process of law in violation of the fourteenth amendment of the constitution of the United States. It is submitted that there is no foundation for such a claim.

2. The State of Connecticut in the exercise of its police power has enacted laws relative to spirituous and intoxicating liquors, and those laws provide that any person selling or keeping with intent to sell such liquors without having a license therefor shall be fined; that a druggist may use such liquors for compounding prescriptions and sell them on a practicing physician's prescription, he having a druggist's license therefor. The granting of such license being discretionary with the County Commissioners.

It is apparent why the law relative to druggists was passed. If druggists without a license were permitted to use such liquors for compounding prescriptions, the prescriptions would be in many instances practically intoxicating liquors to be used as a beverage. Some practicing

physicians would combine with a class of druggists and make prescriptions a cover for carrying on the liquor traffic, and many druggists would not confine their sales to either compounded prescriptions or on physician's prescriptions.

3. These laws of which the plaintiff in error complains have been held by the Supreme Court of Errors of the State of Connecticut not to be repugnant to the constitution of that state.

State *v.* Gray, 61 Conn. 46.

4. That the several states of the Union have the right to pass such laws in the exercise of their police power and are the sole judges as to what those laws shall be, has been repeatedly held by this Court.

Crowley *v.* Christensen, 137 U. S. 86.
Elilenbecker *v.* Plymouth County Court, 134 U. S. 31.
Kidd *v.* Pearson, 128 U. S. 1.
Mugler *v.* Kansas and Kansas *v.* Ziebold, 123 U. S. 623.
Barbier *v.* Connolly, 113 U. S. 27.
Foster *v.* Kansas, 112 U. S. 201
Tiernan *v.* Rinker, 102 U. S. 123.
Stone *v.* Mississippi, 101 U. S. 814.
Beer Co. *v.* Massachusetts, 97 U. S. 25.
Bartemeyer *v.* Iowa, 18 Wall. 129.
Downham *v.* Alexander Council, 10 Wall. 173.
License cases, 5 Howard 504.
Prigg *v.* Pennsylvania, 16 Peters 539.

I submit the judgment below should be affirmed.

SOLOMON LUCAS,

Counsel for the State of Connecticut.